

Proper Pronouns, Bathrooms & Misgendering: What HR Needs to Know

Labor & Employment Law Update

By Marissa Borschke and Kevin Kleine on May 7, 2024

On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) issued new Enforcement Guidance on Harassment in the Workplace, which goes into effect immediately.

For the past five years, over one-third of the charges of employment discrimination received by the EEOC included an allegation of unlawful harassment based on race, sex, disability, or another statutorily protected characteristic.

Employers need to be aware of the EEOC's new enforcement guidance because it expands the scope of conduct that constitutes unlawful "harassment" in the workplace which violates Title VII of the Civil Rights Act of 1964 (Title VII).

Title VII protects "sex," which includes "pregnancy, childbirth, and related medical conditions" and sexual orientation and gender identity.

Under the EEOC's new guidance, employee protections against unlawful harassment specifically includes, among other things:

- harassment based on issues linked to a targeted individual's pregnancy, childbirth, **or related medical conditions**;
- **"misgendering"** (i.e., repeated and intentional use of a name or pronoun inconsistent with an individual's known gender identity);
- **"outing"** (i.e., disclosure of an individual's sexual orientation or gender identity without permission);
- **denial of access to a bathroom or other sex-segregated facility** consistent with an individual's gender identity; and
- any of the above conduct within a **"virtual" work environment**.

The EEOC's guidance provides specific examples to illustrate conduct that would qualify as unlawful harassment in these situations.

Pregnancy, Childbirth or Related Medical Conditions

Sex-based harassment under Title VII includes harassment based on the individual's lactation, morning sickness, physical size during pregnancy, using or not using contraception, or deciding to have, or not to have, an abortion.

Misgendering, Outing, Pronouns

Failing to address or designate an employee by their known gender identity or correct pronoun (a/k/a misgendering) qualifies as unlawful harassment under Title VII if it is done repeatedly or intentionally. Similarly, disclosing an employee's sexual orientation or gender identity without their permission (a/k/a outing) also qualifies as unlawful harassment.

Sex-based harassment also includes conduct because an individual does not present themselves in a manner that would stereotypically be associated with that person's sex.

Denial of Bathroom Access

Denying an employee access to a bathroom or other sex-segregated facility consistent with their gender identity, **OR** in relation to their pregnancy, childbirth, or related medical conditions may be a violation of Title VII.

Employers should note that in addition to being part of a harassment claim, denial of access to a bathroom consistent with one's gender identity may be a discriminatory action in its *own right* and should be evaluated accordingly.

Virtual Meetings

Harassing conduct is not limited to the physical workplace. Harassment includes conduct if it is conveyed using work-related communication systems, accounts, devices, or platforms (i.e., via email, instant messaging, videoconferencing, or other technologies).

As with a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. Harassment in the "virtual" workplace can include:

- sexist comments made during a video meeting;
- ageist or ableist comments typed in a group chat;
- racist imagery that is visible in an employee's workspace while the employee participates in a video meeting; or
- sexual comments made during a video meeting about a bed being near an employee in the video image.

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In sum, the EEOC's new enforcement guidance enhanced protections against workplace harassment for employees, notably for employees who have medical conditions related to pregnancy or childbirth, particular gender/pronoun and/or restroom preferences, and for employees who identify as LGBTQ+ or are pregnant.

This new guidance, however, also covers other statutorily protected characteristics. With that in mind, employers need to exercise caution and be patient to see how courts respond to the EEOC's new enforcement guidance, as there's little doubt it will be challenged and spark mounting legal battles in the coming years.

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